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No. 92-40

In The

Supreme Court of the United States

October Term, 1992

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,

Petitioner,

vs.

BOB ODOM,

Respondent.

Petition for Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Respondent addresses the Statement of the Case presented by the Petitioner because the same contains not only inaccuracies, but also omissions of pertinent matters by the Petitioner.

The Petitioner makes reference to Dr. John J. Shea and the fact that he saw the Respondent, Bob Odom, in 1978. The Petitioner fails to advise this Court that Dr. Shea did not testify in the trial of this case nor were his records admitted as substantive evidence in said trial. The Petitioner's statements are clearly meant to mislead this Court on this point. In addition, the record to which

the Petitioner refers was a letter of July 6, 1978, in which Dr. Shea wrote in part as follows:

> "You have a very severe high tone sensorineural hearing loss in both ears with poor comprehension probably inherited from your mother and made worse by that train accident in 1971, for which there is no medical or surgical treatment possible." [Defendant's Exhibit 2]

Next the Petitioner states that the Respondent, Bob Odom, did not plead facts nor did he present evidence at trial explaining the reason why suit was filed in 1984 as opposed to 1978. The statement is in error. Bob Odom testified as follows:

> "Q. Did you ever know that noise was causing your hearing loss until Dr. Mortin told you in 1983 or 1984?
>
> A. No, sir." [Vol. VI; R-111]

The Petitioner then makes reference to Dr. Morris Davidson and a certain history he took from the Respondent. Dr. Davidson's medical record is not fully set out by the Petitioner. First, we would note that Dr. Davidson did not testify at trial nor were any records admitted into evidence and, therefore, the Petitioner's reference to Dr. Davidson is not relevant. For the sake of completeness, the medical record of Dr. Davidson, which was not in evidence in this case, was as follows:

> "Comes in to see about his hearing. Notices that he has had difficulty hearing for the past several yrs. Much worse when he has a cold. When the cold cleared up he does better. He states his mother had a considerable hearing loss most of her life. He has had no ear infections. Worked

> around only a mod. amount of loud noise. The nose is straight. Teeth are fair. Tonsils are quite large. NPh clean. Both ears completely normal. Audio as follows: M60 ISO R 20 20 20 30 55 70 90 105 1 L 10 15 35 65 1 1 100 1 1
>
> 25 I I I I 15 20 30 1 1 1 1
>
> Discrimination on the rt at 60db, 16%, and on the left a 55db, 24%. This may be on familial basis. Recheck 1 yr.
>
> [Defendant's Exh. C to Second Amended Post Trial Motion]

Finally, the Illinois Appellate Court, Fifth District in its Supplemental Order on Denial of Rehearing, stated in addition to what the Petitioner has set out the following succeeding sentence:

> "Here, defendant failed to plead the statute of limitations and the issue is therefore waived on appeal."

This sentence clears up the false impression the Petitioner has presented by this omission.

SUMMARY OF ARGUMENT

(1) That when a FELA action is filed in a state court it is subject to the local rules of practice and procedure.

(2) The statute of limitations is an affirmative defense under the rules of practice and procedure in Illinois.

(3) That the Petitioner failed to plead the defense of statute of limitations as an affirmative defense and, therefore, waived the same.

(4) In the alternative, the Plaintiff did prove that he brought his case within the applicable statute of limitations as he did not know that his hearing loss was caused by noise until 1983 and 1984.

(5) That the Plaintiff's Complaint was filed on August 15, 1984, well within the statute.

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DENY THE WRIT WHERE THE ILLINOIS COURTS HAVE CORRECTLY APPLIED THE LAW AND THE PLAINTIFF HAS MET HIS BURDEN OF PROOF.

The Petitioner's argument is two-fold, the first being that the Illinois Appellate Court erred when it ruled that the Petitioner must plead the statute of limitations, and second, that Respondent failed to prove that he brought his action within the three year statute of limitations. We submit that neither argument is well taken.

As to the first point we submit that the Illinois Appellate Court correctly ruled that the Petitioner must plead the statute of limitations as an affirmative defense and that failure to do so waives that defense. This action was tried in a state court and therefore, is subject to the local rules of practice and procedure. See *Chesapeake and Ohio Railway Company v. DeAtley*, 241 U.S. 310. The procedural law in the State of Illinois states that statutes of limitations are procedural and that defenses raised thereunder are affirmative defenses that must be pled by the Defendant and if they are not they are waived. The position of the Appellate Court that the statute of limitations is an affirmative defense is also supported by

Drazan v. United States, 762 F.2d 56 (7th Cir.) and *Ricard v. Elgin, Joliet & Eastern Railway Company*, 750 F.Supp. 372.

The second point raised by the Petitioner is that the Respondent failed to sustain his burden of proof that his case was filed within the applicable statute of limitations which position is not well taken.

The Petitioner bases his argument on Dr. Shea's report of 1978 which as we pointed out earlier was not admitted into evidence nor was his testimony presented to the jury. The only evidence at trial was the Plaintiff's testimony that he did not know that his hearing was caused by noise until 1983 or 1984. The Plaintiff's Complaint was filed on August 15, 1984, well within the three year statute. We would additionally point out that the Petitioner did not submit this issue to the jury thereby waiving a determination by the jury of this issue.

The Petitioner appears to rely on *Fries v. Chicago NW Transportation Co.*, 909 F.2d 1092 (7th Cir. 1990) to support its position. We submit that the *Fries* case is clearly distinguishable from this case and that it is not controlling.

The *Fries* case was one brought for damages for hearing loss under the Federal Employer's Liability Act. In 1980 or 1981 Fries first noticed a decline in his hearing and he began experiencing timitus in either 1981 or 1982. Fries admitted that in 1981 and 1982 the frequency of the ringing would increase toward the end of the workday, worsen throughout the workweek and would only subside after two days of quiet on the weekend. In order to recuperate he needed silence for two hours after returning home from work because he just felt terrible. The District Court found that based upon the above facts, that

Fries either knew or should have known that his hearing loss was caused by noise at work and, therefore, the statute of limitations started to run in 1981 or 1982.

The Court of Appeals stated that Section 56 of FELA provides that no cause of action may be maintained under the statute "unless commenced within three years from the day the cause of action accrued. Accrual is defined in terms of two components, the injury and its cause, for statute of limitations purposes." The evidence in our case is that Odom knew he had a hearing loss at least on July 6, 1978. The Plaintiff testified that he did not know that noise caused or was causing his hearing loss until he was told that by Dr. Mortin in 1983 or 1984. This is all the testimony there was as to the Plaintiff's knowledge about the cause of his hearing loss before 1983 or 1984. There is no evidence in the record that could lead this or any Court to the conclusion that there were facts known to the Plaintiff from which he knew, should have known or should have investigated a causal connection between noise at work and the Plaintiff's hearing loss. The evidence is unquestioned that the Plaintiff did not know that the cause of his hearing loss was noise from work until 1983 or 1984. The lawsuit was filed on August 15, 1984, well within the three year statute of limitations; therefore the Petitioner's position that the Plaintiff failed to prove that this case was brought within the statute of limitations is not well taken.

CONCLUSION

The opinion of the Illinois Appellate Court, Fifth District, should be allowed to stand because the same is in conformity with the applicable facts and law and this Court should deny the Petitioner's petition for the reasons stated herein.

Respectfully submitted,

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